Petition

81-1660

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NO. ____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

MEMPHIS MOBILE TELEPHONE, INC., AND
RADIO TELEPHONE INDUSTRIES, INC.,

Petitioners,

v.

THE FEDERAL COMMUNICATIONS
COMMISSION, ET AL.,

Respondents.

ON WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA
CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a consolidated administrative proceeding in which the Federal Communications Commission (a) investigated alleged anticompetitive conduct of four radio common carriers and (b) acted upon a construction permit application of only one of those carriers constituted an "investigation" which is reviewable by the United States Court of Appeals under 47 U.S.C.A. § 402(a) or constituted a "licensing" proceeding and is reviewable only under 47 U.S.C.A. § 402(b).

LIST OF PARTIES

The petition is brought by Memphis Mobile Telephone, Inc., and Radio Telephone Industries, Inc. Both were petitioners before the Court of Appeals.

The Federal Communications Commission and the United States of America were respondents before the Court of Appeals.

Mahaffey Message Relay, Inc., Mobilfone Communications, AAA Anserphone Inc. - Jackson and Airsignal International, Inc., were intervenors before the Court of Appeals.

LIST OF PETITIONERS' AFFILIATES

The following information is provided pursuant to the requirements of Rule 28.1. Memphis Mobile Telephone, Inc., is affiliated, through stock ownership, with the following corporations:

El Dorado Mobile Telephone, Inc.; Russellville Radio Telephone Company, Inc.; Little Rock Radio Telephone Company, Inc.; Grant County Radio Telephone Company, Inc.; Mississippi County Communications Company, Inc.; Hot Springs Radio Telephone Company, Inc.; Morrilton Radio Telephone Company, Inc.; Conway Radio Telephone Company, Inc.; Malvern Radio Telephone Company, Inc.; Pocahontas Radio Telephone Company, Inc.; and Batesville Radio Telephone Company, Inc. Radio Telephone Industries, Inc., is not affiliated with any other companies.

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THE FEDERAL COMMUNICATIONS COMMISSION,
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PETITION FOR A WRIT OF CERTIORARI

Petitioners Memphis Mobile Telephone, Inc., and Radio Telephone Industries, Inc., respectfully pray that a writ of certiorari issue to review the Orders of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on November 10, 1981, and December 9, 1981.

OPINIONS BELOW

The Orders of the Court of Appeals, not reported, appear in the Appendix hereto. The November 10, 1981, Order dismissed the Petition for Review of an administratively final Order of the Federal Communications Commission (hereafter referred to as "the Commission") released July 23, 1981. A copy of the Commission's Order, also unreported, appears in the Appendix hereto. The Commission's Order affirmed an earlier Report and Order of the Commission's Review Board. The Review Board's Report and Order, reported at Mahaffey Message Relay, Inc., 79 F.C.C. 2d 399 (1980), affirmed, in part, and reversed in part, an earlier Initial Decision by

Administrative Law Judge Daniel M. Head. Judge Head's Initial Decision is reported at Mahaffey Message Relay, Inc., 79 F.C.C. 2d 414 (1979).

JURISDICTION

The Dismissal Order of the Court of Appeals was entered on November 10, 1981. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on December 9, 1981, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C.A. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

Section 402(a) and (b) of the Communications Act of 1934, 47 U.S.C.A. §§ 402(a), (b):

> Sec. 402(a) Any proceeding to enjoin, set aside, annul, or suspend any order of the

Commission under this Act (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 19A of Title 5.

(b) Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by section 325 of this title whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any

construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1) - (4) of this subsection.

(7) By any person upon whom an order to cease and desist has been served under section 312 of this title.

(8) By any radio operator whose license has been suspended by the Commission.

STATEMENT OF THE CASE

Memphis Mobile Telephone, Inc., and Radio Telephone Industries, Inc., timely filed their Petition for Review with the U. S. Court of Appeals for the District of Columbia Circuit pursuant to Section 402(a) of the Communications Act of 1934, 47 U.S.C.A. § 402(a). In petitioners' judgment § 402(a) was the proper statutory provision for judicial

review inasmuch as those portions of the Commission's orders which petitioners ask the Court of Appeals to review were investigatory in nature rather than being an exercise of the Commission's licensing powers.

The Commission filed a Motion to Dismiss with the Court of Appeals on the grounds that the agency proceeding was a licensing proceeding reviewable only pursuant to Section 402(b) of the Communications Act of 1934, 47 U.S.C.A. § 402(b).

The Court of Appeals agreed with the Commission that the agency proceeding was a licensing proceeding and that § 402(b) was the exclusive provision of the Communications Act governing appeals of licensing proceedings. The Court thus dismissed the Petition for Review

on the basis that it was untimely filed under § 402(b). 1/

The issue raised, then, is whether the Commission's proceeding was an investigation, a licensing proceeding, or both. If it is found that the Commission's proceeding was both an investigation and a licensing proceeding, then an issue is raised whether the proceeding is separable for the purpose of judicial review or whether § 402(b) is the controlling, and exclusive, provision for review. An understanding of the nature and background of the Commission's proceedings is essential to resolution of these issues.

1/ *The Petition for Review was timely, however, under 402(a) of the Communications Act.*

On August 4, 1976, and September 30, 1976, the Commission consolidated several then pending proceedings for oral hearing before an Administrative Law Judge. The consolidated proceeding was, in turn, divided into three distinct phases which were thereafter designated Phases I, II and III, respectively.

Phase I, which was investigative in nature, arose out of complaints and petitions filed with the Commission by Memphis Mobile Telephone, Inc., alleging that Mahaffey Message Relay, Inc., a Commission licensee and common carrier by radio, unilaterally and together with three other Commission licensees and common carriers, those being Otis L. Hale d/b/a Mobilfone, AAA Anserphone, Inc.-Jackson, and Airsignal International,

Inc., had engaged in anticompetitive conduct intended to preclude Memphis Mobile Telephone, Inc., from entering the radio common carrier market in Memphis, TN. According to the Commission's Designation Order, Phase I of the proceedings was convened for the following purposes:

> To determine whether Mahaffey Message Relay, Inc., AAA Answerphone-Jackson, and Otis L. Hale d/b/a Mobilphone have jointly engaged in conduct intended to prevent the filing of competing applications for radio carrier frequencies in the greater Memphis, Tennessee metropolitan market subsequent to January 1, 1973.
>
> To determine the facts and circumstances surrounding Mahaffey's filing of applications for 450 MHz and lowband one-way frequencies in the Memphis Metropolitan market subsequent to January 1, 1973.

Hearing on the issues raised in Phase I required eight days of oral testimony and involved the active participation of six

separate parties, all represented by counsel. Phase I was clearly the predominant phase of the consolidated proceedings. It lasted significantly longer than Phase III, involved more parties, and related to issues of greater precedental significance than Phase III. The Petition for Review filed with the U. S. Court of Appeals for the District of Columbia Circuit sought review of the issues in Phase I only.

Phase II of the agency proceedings arose out of complaints filed by Radio Telephone Industries, Inc., and Messrs. Larry Short and Douglas Wagnon pursuant to Section 208 of the Communications Act of 1934, as amended, 47 U.S.C. § 208. The complaints alleged generally that Mahaffey Message Relay, Inc., had constructed a vertically integrated

monopoly by requiring that terminal equipment owned by its customers be installed and maintained by Mahaffey Communications Company, a separate family owned company, in violation of Sections 203 and 313 of the Communications Act, 47 U.S.C. 203 and 313. Hearing on the issues raised in Phase II required five days of oral testimony and involved the active participation of five parties. The issues involved in Phase II were not appealed to the Court of Appeals.

Phase III, the licensing phase of the consolidated agency proceedings, involved three applications by Mahaffey Message Relay, Inc., for construction permits in the Domestic Public Land Mobile Radio Service (DPLMRS). Hearing on the issues in Phase III required one day only of oral testimony and involved

the active participation of only two parties, those being Mahaffey Message Relay, Inc., and the Commission's own Common Carrier Bureau. The issues involved in Phase III, like those involved in Phase II, were not appealed to the Court of Appeals.

At the time of the oral hearing in Phase III, the licensing phase, neither Radio Telephone Industries, Inc., nor Memphis Mobile Telephone, Inc., were parties to that phase of the proceeding. Memphis Mobile Telephone, Inc., had originally been a party in both Phases I and III, but its status as a party in Phase III was terminated by the Commission itself. At the time of that termination, the Commission apparently viewed the two phases of the consolidated proceedings as two separate proceedings, Phase I as an investigation and Phase

III as a construction permit application proceeding. The issue of Memphis Mobile Telephone's status as a party in Phase III was addressed by the Administrative Law Judge in an Order released January 31, 1979, as follows:

> "Turning to the question of MMT's request to retain its status as a party . . . MMT's intent is to file proposed findings in connection with Phase III. However, this would not serve any useful purpose since MMT no longer has any interest in Mahaffey's application . . . Therefore, we see no reason to continue MMT's party status on Phase III issues. On the other hand, MMT's request can be interpreted as asking to maintain its party status in relation to Phase I issues, in which MMT substantially participated . . . we agree with the Bureau's position that MMT should retain its party status on Phase I issues . . . we will continue MMT's status as a party but only with regard to any further activities involving Phase I issues."

The Judge viewed Memphis Mobile Telephone, Inc., as a party to the investigation conducted by the Commission in Phase I, but not as a part in "interest in Mahaffey's application," which was under consideration in Phase III only. For that reason, Memphis Mobile Telephone's status as a party in Phase III was terminated.

The Judge's decision to terminate Memphis Mobile Telephone's status as a party in Phase III was upheld by the Commission in an Order dated November 30, 1979, with the following explanation:

> "In our view, the ALJ did not abuse his discretion. Since MMT's application has been dismissed it no longer has standing as a competing applicant . . . Airsignal, AAA-Anserphone and Otis L. Hale (Mobilfone) are party-respondents in the case for purposes

> of participation with respect to an issue which was tried in Phase I of the proceeding. MMT has participated in that Phase and . . . retains its status as a party thereto."

The above explanations accurately reflect the Commission's understanding of the nature of its own proceedings at that time. The Commission viewed Phase III as a licensing proceeding in which Memphis Mobile Telephone was without standing to participate, and viewed Phase I as an investigation in which Airsignal, AAA-Anserphone, and Mobilefone were "party-respondents" and in which Memphis Mobile Telephone had standing as a party.

Because of Memphis Mobile Telephone's lack of standing in Phase III, the Petition for Review filed with the Court of Appeals sought review of the Commission's

actions or inactions with respect to the issues raised in Phase I only. In contrast to Phase III, the proceedings in Phase I did not directly involve the merits of Mahaffey's applications, i.e., there was no determination to be made whether the applications should be granted or denied. Rather, Phase I was investigative in nature and involved an inquiry not only into alleged unilateral anticompetitive conduct by Mahaffey, but also into alleged joint anticompetitive conduct by Mahaffey, Airsignal, AAA Answerphone and Mobilfone. In conducting the inquiry in Phase I, the Commission was not exercising any of its licensing powers, but was instead exercising its power to conduct an inquiry pursuant to Section 403 of the Communications Act of 1934, 47 U.S.C. 403.

Alternatively, Phase I might be viewed as an adjudicatory enforcement proceeding convened in response to complaints filed with the Commission by petitioners and convened either pursuant to powers conferred by 47 U.S.C. 208 or 47 U.S.C. 403. If the Commission was not exercising its investigative jurisdiction under Sections 208 or 403, then it had no jurisdiction to even proceed against Airsignal, AAA Anserphone or Mobilfone, parties characterized by the Commission itself as "party-respondents," for not one of them had a license application pending in the subject proceedings.

The joint conduct into which the Commission inquired in Phase I, conduct alleged by petitioners to be anticompetitive in nature, involved an agreement

among and between Mahaffey, Airsignal, AAA Anserphone and Mobilfone [2/] which had the effect of dividing among the four of them the radio common carrier market in the greater Memphis, TN, area, to the exclusion of potential competitors, including Memphis Mobile Telephone, Inc. The horizontal market division accomplished by that agreement, illegal per se under the antitrust laws, was essentially ignored by the Commission as being merely an expedient means to accomplish the settlement of issues which might otherwise have arisen in the context of a comparative hearing upon the merits of mutually exclusive DPLMRS applications. Even if that were so, and even if the Commission were ultimately to find and

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2/ *Mobilfone disputes that it ever entered into the agreement.*

conclude that the agreement was consistent with the public interest and not contrary thereto, the fact is that the agreement was never presented to the Commission by the parties for the Commission's consideration, approval or disapproval. And the Commission itself, now that it is aware of the agreement's existence, has refused to formally address the merits or demerits of the agreement itself, has refused to consider the inherently anticompetitive impact of that agreement, and has refused to compel the parties to the agreement to bring the agreement before the Commission for approval or disapproval.

By their agreement, the four respondents divided the relevant market among themselves along both geographic and product lines. Under the terms of that

agreement, the parties have allocated Memphis proper to Mahaffey as its market territory; have allocated South Haven, MS, to AAA Anserphone; and have allocated West Memphis, AR, to Airsignal and Mobilfone. Of the fourteen frequencies available, the parties decided to allocate six to Mahaffey, three to AAA Anserphone, three to Airsignal, and two to Mobilfone. In terms of the nature of service to be provided, the parties allocated interconnected mobile telephone service to Mahaffey and AAA Anserphone, non-interconnected repeater service to Mobilfone and Airsignal, and interconnected repeater service to Mahaffey. Petitioners cannot imagine a more restrictive anticompetitive horizontal market division than that accomplished by the four parties who were respondents in Phase I

of the agency proceedings. Nonetheless, the Commission refused to take any remedial action.

The anticompetitive conduct of the four respondents and the inherently anti-competitive nature of the settlement agreement were the principal issues raised by petitioners and presented to the Commission in agency appellate proceedings. In its "Application for Review" filed with the Commission, petitioners argued at page -3- that:

> "THE REVIEW BOARD'S CONCLUSION THAT AN EXTRA RECORD SETTLEMENT AGREEMENT, NOT SUBMITTED TO OR APPROVED BY THE COMMISSION, MAY NOT CONSTITUTE ANTI-COMPETITIVE CONDUCT IN AND OF ITSELF RAISES AN IMPORTANT ISSUE OF LAW AND POLICY WHICH WARRANTS COMMISSION REVIEW"

The petitioners, after presenting their argument, asked the Commission to

> ". . . scrutinize the

> settlement agreement as if the same were submitted to it for approval pursuant to 47 C.F.R. 21.29 . . . (and) . . . disapprove the settlement agreement as being anti-competitive for the reasons set forth above . . ."

In response to the Application for Review, the Commission failed or refused to address any of the issues raised, and simply denied the Application in a summary order. Petitioners were thus aggrieved by the failure of the Commission to find and conclude, as a consequence of its investigation, that the four respondents jointly engaged in anti-competitive conduct, and by the Commission's failure to find and conclude that the settlement agreement, entered into without approval of the Commission, was illegal and of no force and effect. Based upon that grievance, petitioners filed their Petition for Review with the

U. S. Court of Appeals for the District of Columbia Circuit pursuant to 47 U.S.C. § 402(a).

The substantive issue which petitioners wish to present to the Court of Appeals for review is

> whether a horizontal market division entered into among four radio common carriers constitutes anticompetitive conduct cognizable by the Federal Communications Commission and, if so, what remedies are available from the Commission to aggrieved parties as a consequence thereof.

The Court of Appeals has thus far declined review, but has instead dismissed the Petition for Review on the grounds that the Petition was brought under 47 U.S.C. § 402(a) rather than 47 U.S.C. § 402(b).

ARGUMENT

Section 402 of the Communications Act is a difficult jurisdictional provision which repeatedly plagues appellate

counsel and the Courts of Appeals in its application and interpretation. Certiorari should be granted so that the Supreme Court might provide clear guidance to the lower courts and to counsel concerning the proper procedures to be followed in the review and appeal of Commission decisions under that statutory provision.

The magnitude of the uncertainty which currently exists is evidenced by the fact that some petitioners, aggrieved by decisions of the Commission, seek review under both Sections 402(a) and 402(b). Gerico Investment Co., v. Federal Commun. Com'n, 240 F.2d 410 (D.C. Cir. 1957); Kessler v. FCC, 326 F.2d 653 (D.C. Cir. 1964); Tomah-Mauston Broadcasting Co. v. FCC, 306 F.2d 811 (D.C. Cir. 1962); Functional Music, Inc. v. FCC,

274 F.2d 543 (D.C. Cir. 1958); Columbia Broadcasting Sys. v. Federal Comm. Com'n, 211 F.2d 644 (D.C. Cir. 1954); Rhode Island Television Corporation v. FCC, 320 F.2d 762 (D.C. Cir. 1963); and National Ass'n of Broadcasters v. F.C.C., 554 F.2d 1118 (D.C. Cir. 1976). Such a cumbersome procedure compels the Court of Appeals, in every case in which there is a dual filing, to consume precious additional judicial resources determining which of the two avenues of review is the more appropriate one. Proper functioning of the appellate process requires clarification of the statute by the Supreme Court so that the awkward, expensive, and judicially inefficient practice of filing under both sections 402(a) and 402(b) will no longer be encouraged or deemed necessary by any appellate counsel.

Petitioners, secondly, submit that dismissal of their Petition for Review by the U. S. Court of Appeals for the District of Columbia Circuit conflicts with the decision of the U. S. Court of Appeals for the Seventh Circuit in Campos v. F.C.C., 650 F.2d 890 (1981). The Court of Appeals there held that Section 402(b) of the Communications Act is to be narrowly construed, and found review of radio operator license proceedings to be proper under 402(a). In the instant proceeding, in contrast, the Court of Appeals construed 402(b) very broadly as being the exclusive review provision where any part of the proceedings below involved an excercise of the Commission's licensing functions. Petitioners believe a more enlightened construction of 402(a) and 402(b) would

allow appeal of separable portions of the same proceeding under separate pertinent statutory provisions. Thus, in the instant circumstances, Phase I, an investigation, is reviewable under 402(a); Phase II, a complaint proceeding, is reviewable under 402(a); and Phase III, a licensing proceeding is reviewable under 402(b). Petitioners submit that no other rational resolution of the jurisdictional issue presented is possible in these unique circumstances where:

> (a) the FCC has consolidated an investigation of multiple respondents with complaints filed by multiple complainants, and further consolidated both proceedings with construction permit applications of one of the four respondents,
>
> (b) the consolidated proceeding was thereafter segregated into three separate and distinct phases, each with different parties and issues, and

> (c) the construction permit applications of three of the party-respondents to the Phase I investigation were bifurcated into separate Commission proceedings which are still pending.

Such an interpretation by the Supreme Court would, petitioners believe, prevent apparent conflicts between the decisions of the various Courts of Appeals.

Thirdly, petitioners note that the statutory purpose for the distinction between Sections 402(a) and 402(b) was to place venue of Section 402(b) appeals in the U. S. Court of Appeals for the District of Columbia Circuit. In Scripps-Howard Radio v. Federal Communications Commission, 316 U.S. 4, 16, 62 S.CT. 875, 882 (1942), the Supreme Court discussed the difference between Section 402(a) and 402(b) in the following language:

> "It is urged that the orders reviewable under § 402(a), as to which the power to grant

> stays is undeniable, are intrinsically different from those reviewable under §402(b). But while the two sections route appeals to different courts, the differentiation was in large measure the product of Congressional solicitude for the convenience of litigants. It had no relation to the scope of the judicial function which the courts were called upon to perform. For example, if the Commission on its own motion modifies a station license, review is had under §402(a) in the appropriate district court. However, if it grants an application for modification of a license, an appeal lies under §402(b) to the Court of Appeals for the District of Columbia. Both cases give rise to the same kind of issues on appeal. Both orders are equally susceptible of being stayed on appeal. As the legislative history of the Act plainly shows, Congress provided the two roads to judicial review only to save a licensee the inconvenience of litigating an appeal in Washington in situations where the Commission's order arose out of a proceeding not instituted by the licensee."

Although Section 402 was amended and

modified somewhat in 1952, the Courts of Appeals still recognize that the distinction between Sections 402(a) and 402(b) is one of forum selection. In Functional Music, Inc. v. F.C.C., 274 F.2d 543, 547 n.10 (D.C. Cir. 1958), for example, the Court of Appeals, citing Scripps-Howard Radio Co. v. Federal Communications Comm., supra, noted that:

> "The orders encompassed by §402(b) directly affect the radio-licensing function of the Commission, and in the interest of uniformity, appeal therefrom is concentrated in the Court of Appeals for the District of Columbia Circuit. All other Commission orders may be reviewed alternatively in the Court of Appeals for the Circuit where the party resides or has its principal office, or in the Court of Appeals for the District of Columbia Circuit. 64 Stat. 1130 (1950), 5 U.S.C.A. §1033 (1952)."

Forum selection considerations also appear to be an important factor in the

decisions of the courts in Helena TV, Inc. v. Federal Communications Commission, 269 F.2d 30 (9th Cir. 1959); WHDH, Inc. v. United States, 457 F.2d 559, 561 (1st Cir. 1972); Valley Vision, Inc. v. F.C.C., 399 F.2d 511 (9th Cir. 1968); and Cook Inc. v. United States, 394 F.2d 84 (7th Cir. 1968).

In the instant proceeding, petitioners have sought review in the United States Court of Appeals for the District of Columbia Circuit, a proper forum for review of a Section 402(a) or a Section 402(b) order. No party has grounds to complain that petitioners are forum shopping or that their rights have in the slightest been adversely affected by the bringing of the petition in the U. S. Court of Appeals for the District of Columbia Circuit. Petitioners do not

believe it is appropriate for their Petition for Review to have been dismissed when the statutory purpose(s) for any distinctions between Sections 402(a) and 402(b) have thus been completely satisfied.

A fourth reason for granting certiorari is to prevent the procedural confusion and administrative delays which will otherwise result in the processing of separate, but related, proceedings still pending before the Commission. The Court is advised that Airsignal, Mobilfone, AAA-Anserphone, and Mahaffey all have DPLMRS applications pending before the Commission and that those proceedings directly involve the greater Memph[illegible] common carrier market. AAA-Anserphone's application for construction permits in South Haven, MS, is

pending in FCC File No. 20032-C2-P-(4)-74. Mobilfone's application for construction permits in West Memphis, AR, is pending in FCC File No. 8942-C2-P-(2)-73. Airsignal's application for construction permits in West Memphis, AR, is pending before the FCC in File No. 20076-C2-P-(4)-74. Those three applications were the subject, inter alia, of the settlement agreement between the "party-respondents" in Phase I, although none of the three applications was actually before the Commission in its investigation in the consolidated proceedings below. All three were pending in separate dockets. When the investigation was completed, the Commission, in its final Order, stated in footnote 1 thereof that:

> ". . . we deem it appropriate that the Common Carrier Bureau resume

> processing of those applications (of the three party-respondents) and determine, consistent with its delegation of authority, whether the grant of those applications would serve the public interest, convenience and necessity."

Memphis Mobile Telephone, believing Phase I of the proceedings below to have been an investigation of the conduct of the four party-respondents and not a licensing proceeding as the Commission now claims, has asked the Commission, in its disposition of the three above-referenced applications, to take administrative notice of the unlawful conduct disclosed in the consolidated proceedings below. The Common Carrier Bureau has yet to take any action upon that request or upon Memphis Mobile Telephone's Petition to Deny the three applications, and all three are still awaiting initial

disposition.

If the Court views Phase I of the proceedings below to have constituted an exercise of the Commission's licensing powers and not, as petitioners submit, its investigative powers, then the inevitable result will be bifurcated judicial review of the separate proceedings. Thus, if the Court of Appeals' Dismissal Order is ultimately upheld, and if the Commission thereafter grants the pending applications of the three party-respondents, Memphis Mobile Telephone would be forced by circumstances to file Petitions for Review of all three applications under 47 U.S.C. 402(b), or under both 47 U.S.C. 402(b) and 402(a).

This awkward procedure would be necessary in order for Memphis Mobile Telephone to obtain judicial review of

the issues raised in Phase I of the proceeding below. What Memphis Mobile Telephone would much prefer is for the Court to recognize Phase I for what it actually is, an exercise of the Commission's investigatory powers under 47 U.S.C. 208 or 47 U.S.C. 403, and reviewable under 47 U.S.C. 402(a), thereby paving the way for early judical review of an issue common to all five proceedings.

Petitioners believe that the party-respondents themselves view Phase I of the proceedings below to have been an investigation of their conduct; just as petitioners do. In recent correspondence to the Commission, party-respondent AAA Anserphone, Inc.-Jackson stated:

> "The Commission has concluded on the basis of an evidentiary hearing that AAA Anserphone, Inc.-Jackson (AAA) did not engage in anticompetitive conduct in the prosecution of

> its . . . application . . . That decision was appealed by Memphis Mobile Telephone, Inc. (MMT) to the United States Court of Appeals for the District of Columbia Circuit . . . Enclosed is a copy of the Court's Order of November 10, 1981, which granted the Commission's motion to dismiss MMT's appeal as untimely filed. Accordingly, the Commission's findings as to AAA's qualifications are no longer subject to judicial review, and the Commission's disposition of MMT's charges of anti-competitive conduct should be considered res judicata . . ."

It would thus appear that AAA views Phase I of the proceedings below to have constituted an investigation of its conduct which is now res judicata in its own pending construction permit application proceeding. Petitioners do not consider themselves bound by the representatives of AAA, but would agree that Phase I constituted an investigation of

the conduct of AAA Anserphone, Inc. - Jackson; that AAA's application was not before the Commission in that proceeding; and that AAA's application is now pending resolution by the Commission and is neither administratively final nor judicially reviewable at this time. What is judicially reviewable is the action or inaction of the Commission in its investigation in Phase I, and that review may be conducted pursuant to 47 U.S.C. §402(a).

Finally, but most important from the viewpoint of your petitioners, petitioners believe the dismissal Order of the Court of Appeals to be erroneous as a matter of law. The impact of that Order is to unjustly deprive petitioners of their right of judicial review. It is petitioners' opinion that the Court

below misconstrued the applicability of 47 U.S.C.A. § 402(b). The Court of Appeals erroneously concluded that petitioners are persons aggrieved or whose interests are adversely affected by an order of the Commission granting an application for a construction permit or station license. [47 U.S.C.A. § 402(b)(1), (6) (1976)]. Contrary to the Court of Appeals' conclusion, neither Memphis Mobile Telephone, Inc., nor Radio Telephone Industries, Inc., can be considered an "aggrieved" person pursuant to Section 402(b)(6) inasmuch as neither company, upon conclusion of the consolidated proceedings below, was a party to the Mahaffey Message Relay applications, the only applications then before the Commission in the involved proceedings. To the contrary, petitioners' aggrievement

arises from their status as complainants against the anticompetitive actions of one or more of the four party-respondents whose conduct the Commission was investigating.

Not only were Memphis Mobile Telephone, Inc., and Radio Telephone Industries, Inc., neither applicants nor protestants to any application in the consolidated proceedings below, the party-respondents AAA Anserphone-Jackson, Inc., Mobilfone Communications, and Airsignal International, Inc., also were neither applicants nor protestants in those proceedings. Insofar as the Commissions' actions, or inactions, in the consolidated proceedings below affected the rights of Memphis Mobile Telephone, Inc., Radio Telephone Industries, Inc., AAA Anserphone-Jackson, Inc., Mobilfone Communications, and

Airsignal International, Inc., the Commission was not exercising any of its licensing powers. Assuming the Commission had power to, in some fashion, adjudicate the rights of the above named parties, it was exercising investigative or adjudicatory powers conferred upon it by statute under 47 U.S.C.A. § 403 or § 208.

The only applicant in the proceedings below was Mahaffey Message Relay, Inc., and the only party to Mahaffey's applications, either in support of or in opposition thereto, was the Commission's own Common Carrier Bureau. Neither Mahaffey Message Relay, Inc., nor the Common Carrier Bureau has asked for judicial review of the Commission's disposition of Mahaffey's applications. Thus no party to the proceedings below has asserted any claim that it is

aggrieved by the Commission's disposition of the Mahaffey applications. Jurisdiction pursuant to 47 U.S.C.A. § 402(b)(6), therefore, cannot and could not be asserted in the U. S. Court of Appeals for the District of Columbia Circuit. The Commission's actions, insofar as petitioners were aggrieved thereby, fell outside of the scope of 47 U.S.C.A. § 402(b). Parties aggrieved by Commission actions which fall outside the scope of 47 U.S.C.A. § 402(b) may only seek judicial review pursuant to 47 U.S.C.A. § 402(a).

Section 402(b) requires the U. S. Court of Appeals for the District of Columbia Circuit to examine the nature of the injury alleged to have been suffered by the party seeking judicial review. Under 47 U.S.C.A. § 402(b)(6), if that injury is caused by the grant-

ing or denial of a construction permit or station license application, appeal must be brought pursuant to Section 402 (b) rather then Section 402(a). In the proceedings below, petitioners were not parties to the applications of Mahaffey Message Relay, Inc., but were parties to the Commission's investigation of alleged anticompetitive behavior of four party-respondents, and were complainants in their own right against the conduct of those parties. Petitioners are injured by the Commission's failure to find and conclude that the four party-respondents have engaged in unlawful anticompetitive behavior, and by the Commission's failure to take any remedial action whatsoever with respect thereto. Petitioners' injury can only be judicially reviewed under 47 U.S.C.A. §402(a), and

we ask this Court to so conclude.

CONCLUSION

For these reasons, a writ of certiorari should issue to the judgment and Orders of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted

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Counsel for Petitioner

Appendix

APPENDIX

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 81-1973 SEPTEMBER TERM, 1981

(Service Date November 10, 1981
George A. Fisher, Clerk)

Memphis Mobile Telephone, Inc., et al.,
Petitioners

v.

Federal Communications Commission and
United States of America,
Respondents

BEFORE: Wald, Mikva and Edwards*
Circuit Judges

O R D E R

Upon consideration of respondent's motion to dismiss, intervenor's memorandum in support thereof, petitioner's response, and respondent's and intervenor's replies, it is

ORDERED by the Court that the motion is granted and the petition for review is dismissed. The order that petitioners seek to have us review was plainly an

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* Circuit Judge Edwards did not participate in this order.

order granting applications for construction permits and was thus subject to appeal only under 47 U.S.C. § 402(b)(1), (6) (1976). Petitioners did not appeal within the thirty (30) day period set by id. § 402(c). Their appeal is therefore untimely . .

Per Curiam

APPENDIX

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 81-1973 SEPTEMBER TERM, 1981

(Service Date December 9, 1981
George A. Fisher, Clerk)

Memphis Mobile Telephone, Inc., et al.,
Petitioners

v.

Federal Communications Commission and United States of America,
Respondents

BEFORE: Wald and Mikva, Circuit Judges

O R D E R

On consideration of petitioners' petition for rehearing filed November 24, 1981, it is

ORDERED by the Court that the aforesaid petition is denied.

Per Curiam

APPENDIX

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

CC
FCC 81-338
94713

In the Matter of MAHAFFEY MESSAGE RELAY. INC. Memphis, Tennessee	DOCKET NO. 20871
For Construction Permits for facilities in the Domestic Public Land Mobile Radio Services, to operate in Memphis, Tennessee	File Nos. 8331-C2-P-(8)-73 8557-C2-P-(4)-73 21635-CD-P-75
RADIO TELEPHONE INDUSTRIES, INC. et al.	DOCKET NO. 20938
Complainants v. MAHAFFEY MESSAGE RELAY, INC. Defendant	File Nos. TS-76-209 76-965 76-1244

ORDER

Adopted: July 16, 1981;

Released: July 23, 1981

By the Commission: Commissioner Fogarty Concurring and issuing a statement; Commissioner Dawson abstaining from voting.

1. The Commission has before it for consideration: (a) an Application (79 FCC 2d 399, released May 20, 1980), filed June 19, 1980 by Memphis Mobile Telephone, Inc. and Radio Telephone Industries, Inc.; (b) an Opposition, filed July 14, 1980, by Airsignal International, Inc.; (d) an Opposition, filed July 14, 1980, by Otis L. Hale d/b/a Mobilfone Communications.

2. IT IS ORDERED, That pursuant to Section 1.115(g) of the Commission's Rule the Application for Review, filed June 19, 1980, by Memphis Mobile Telephone, Inc. and Radio Telephone Industries, Inc. IS DENIED.

3. IT IS FURTHER ORDERED, that

this proceeding IS TERMINATED. 1/

FEDERAL COMMUNICATIONS COMMISSION *

William J. Tricarico
Secretary

* See attached concurring statement of Commissioner Joseph R. Fogarty.

1/ By Memorandum Opinion and Order, FCC 76-647, released August 4, 1976, AAA Anserphone, Airsignal International, and Mobilfone were made respondents to this proceeding for purposes of participating in Issue 1. Since Issue 1 involved an alleged conspiracy to block the filing of competing applications for radio common carrier frequencies in the Memphis, Tennessee area, our action herein removes the previous impediment to the grant of those applications. Nevertheless, we will not grant the applications filed by AAA Anserphone, Inc.-Jackson (FCC File No. 20032-C2-P-(4)-74), Airsignal International, Inc. (FCC File No. 20076-C2-P-(4)-74) and Mobilfone Communications (FCC File No. 8942-C2-(2)-73) at this time since only Mahaffey's applications are before us in this proceeding. Rather, we deem it appropriate that the Common Carrier Bureau resume processing of those applications and determine, consistent with its delegation of authority, whether the grant of those applications would serve the public interest, convenience and necessity.

CONCURRING STATEMENT
OF
COMMISSIONER JOSEPH R. FOGARTY

In Re: Mahaffey Message Relay, Inc., Memphis, Tennessee.

While I concur in the Commission's decision to deny review of this proceeding, I remain troubled by the issue of Mahaffey's refusal to certify new shops providing mobile equipment maintenance in violation of Section 202(a) of the Communications Act. On this issue, the ALJ found that Mahaffey had unreasonably limited the entry of service shops by refusing to certify new shops on the arbitrary ground that Memphis already had enough maintenance service providers. In addition to finding this violation of Section 202(a), the ALJ also found that Mahaffey's refusal constituted an anticompetitive practice intended to ensure the competitive advantage of a maintenance business owned by the brother of Mahaffey Radio's president. As a sanction, the ALJ ordered Mahaffey to establish a program for inspecting and approving maintenance shops which are technically competent to install and service equipment compatible with the Mahaffey system, submit such program to the Common Carrier Bureau for approval, and take immediate action on the request of one such shop, General Electronics.

Although the ALJ's disposition of this issue was not appealed to the Review

Board, Board Member Ohlbaum's dissent [1] from the affirmance of the ALJ's decision submitted that Mahaffey's instant application should be denied and that revocation proceedings should be instituted against Mahaffey's existing licenses. The dissent argued that Mahaffey had no reasonable basis for refusing approval of new maintenance shops. Noting that the ALJ, in imposing a more lenient sanction, had relied on the apparent lack of evidence of actual harm resulting from the misconduct, Board member Ohlbaum submitted that this proceeding is not an adjudication of a complaint for damages, and the extent of demonstrated financial injury to other parties is of little significance to the Commission's proper concern with Mahaffey's fitness to be a licensee.

The dissent also advised that if Mahaffey was allowed to remain a licensee, the Commission should provide that Mahaffey's power to approve service shops to maintain subscriber-owned equipment be suspended until Mahaffey adopts standards acceptable to the Commission. Board Member Ohlbaum further suggested that the Commission give consideration to ruling specifically that the base station operator may not reserve to itself the authority to approve the qualifications of shops providing installation and maintenance of

1/ Mahaffey Message Relay, Inc., Dissenting Statement of Board Member Daniel R. Ohlbaum, 79 FCC 2d 411, 411-13 (Rev.Bd. 1980).

subscriber-owned mobile equipment. Noting that the Commission's new DPLMRS rules insure inter-system equipment compatibility, Board Member Ohlbaum observed that there was no apparent reason to put in the hands of the base station operator the power to approve maintenance shops which has been abused in this case.

I find Board Member Ohlbaum's dissent compelling in terms of emphasizing the gravity and basic licensing implications of Mahaffey's misconduct. However, this issue was not appealed to the Review Board, and therefore the Commission's discretion to reach this matter de novo in considering the instant application for review is circumscribed. 2/ I also note that while the Commission has assessed monetary forfeitures and allowed private claims for damages in Section 202(a) cases, 3/ there appears to be no Commission precedent for disqualification of an applicant or revocation of a license on this ground alone. In past cases involving Section 202(a) violations, the Commission has merely ordered that the

2/ Community Broadcasting Service, Inc.; 4 FCC 2d 379 (1966); Communications Act, Section 5(d)(5); and Section 1.115(c) of the Commission's Rules.

3/ Edwards Industries, Inc., 74 FCC 2d 322 (1979); American Satellite Corp., 73 FCC 2d 317 (1979).

offensive practice be discontinued, which is the relief and sanction which has been ordered in this case. 4/

While I therefore am constrained to concur in the Commission's denial of review, I believe that the Commission should direct the Common Carrier Bureau's attention to this case history of maintenance shop certification authority abuse and, in particular, to dissenting Board Member Ohlbaum's cogent point that the Commission should consider amending the DPLMRS rules to provide specifically that the base station operator may not reserve to itself the authority to approve the qualifications of installation and maintenance firms providing service to subscriber-owned mobile equipment. I also expect that the Common Carrier Bureau will closely scrutinize the program for inspecting and approving maintenance shops to be submitted by Mahaffey, and that Mahaffey will recognize that any further anticompetitive conduct will put its licenses in mortal jeopardy.

4/ W.P. Keliipio v. Telephone Co., 54 FCC 2d 549 (1975); Carter v. AT&T, 13 FCC 2d 420 (1967).

Opposition

1

Supreme Court, U.S.
FILED
APR 10 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1660

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

MEMPHIS MOBILE TELEPHONE, INC., AND
RADIO TELEPHONE INDUSTRIES, INC.,

PETITIONERS,

v.

THE FEDERAL COMMUNICATIONS
COMMISSION, ET AL.,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

OPPOSITION BRIEF FOR RESPONDENT MAHAFFEY MESSAGE RELAY, INC.

NORMAN E. JORGENSEN

Kadison, Pfaelzer, Woodard
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Counsel for Mahaffey Message
Relay, Inc.

QUESTIONS PRESENTED

Whether parties that failed to file a timely appeal of a Federal Communications Commission order granting a construction permit in the Domestic Public Land Mobile Radio Service, pursuant to 47 U.S.C. § 402(b), may nevertheless invoke the jurisdiction of an appellate court by claiming that the single order is severable into district and separately appealable proceedings.

LIST OF RESPONDENT'S AFFILIATES

The following information is provided pursuant to the requirements of Rule 28.1. Mahaffey Message Relay, Inc. (Mahaffey) is affiliated with Communications Marketing, Inc.

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JURISDICTION

Respondent received Memphis Mobile Telephone Inc.'s (MMT) petition for writ oi certiorari on March 10, 1982. This brief in opposition is filed within 30 days of that date, pursuant to Sup. Ct. R. 22.1.

STATEMENT OF THE CASE

Between 1973 and 1975, Mahaffey filed applications with the Federal Communications Commission (FCC) for construction permits for radio common carrier frequencies in and around Memphis, Tennessee. Competing applications were filed by Airsignal International, Inc. (Airsignal); Otis L. Hale d/b/a Mobilfone Communications (Mobilfone) and AAA Answerphone, Inc. - Jackson (AAA). Beginning in 1975, Memphis Mobile Telephone, Inc. (MMT) filed a series of objections against these applications.

MMT also tendered for filing certain competing applications.

By Memorandum Opinion and Order, FCC 76-647, released August 4, 1976, attached hereto as Appendix A, the FCC deisgnated the applications of Mahaffey for hearing under the docket number 20871. The issues under consideration included an inquiry into whether Mahaffey, Airsignal AAA and Mobilfone had engaged in conduct intended to prevent the filing of competing applications for radio common carrier frequencies in the Memphis area. This proceeding was later consolidated with certain complaints directed against Mahaffey by Radio Telephone Industries, Inc. (RTI) and others,[1/] with Order, FCC 77M-113, released, January 19, 1977.

1/ The complaints alleged that Mahaffey was in violation of sections 201 and 202 of the Communications Act of 1934. The Commission designated issues for hearing to explore the factual basis of the alleged violations, and to determine what sanctions against Mahaffey, if any, were appropriate. Memorandum Opinion and Order, FCC 76-901, released September 30, 1976, docket number 20938.

The consolidated proceeding was heard in three evidentiary "phases" in order to promote convenience and efficiency. Phase I dealt with the alleged anticompetitive behavior of Mahaffey, Airsignal, Mobilfone and AAA. Phase III dealt with Mahaffey's actual application for a construction permit. Petitioners erroneously allege that these phases constituted separate and distinct proceedings which could be appealed in isolation to the Court of Appeals. As noted more fully at pages 8-10, infra., this claim misstates the record of the proceedings.

After extensive oral hearings and written submissions, the "Initial Decision of Administrative Law Judge Daniel M. Head", FCC 79D-25, released July 5, 1979, was issued. This decision held that Mahaffey and the respondents had not engaged in joint conduct intended to prevent the filing of competing applications, and that

Mahaffey's applications for radio common carrier facilities were filed in good faith and would serve the public interest. Thus, the lack of any anticompetitive conduct by Mahaffey was an important factor in the ultimate decision to grant Mahaffey's applications.

MMT and RTI filed exceptions to the Initial Decision. The FCC's Review Board, affirmed the decision of the Presiding Judge. MMT and RTI then filed an "Application for Review", asking the full Commission to overturn the decision of the Review Board. In its Order, FCC 81-338, released July 23, 1981, the FCC summarily dismissed the MMT/RTI Application for Review. It is this final order that Petitioners attempted to appeal under Section 402(a) of the Communications Act to the Unted States Court of Appeals for the District of Columbia Circut.

Petitioners' court appeal was filed on August 28, 1981, which was more than 30 days after the Commission's final Order was released. Thus, pursuant to 47 U.S.C. § 402(b), the appeal was untimely. See 47 U.S.C. § 402(c). Petitioners claimed, however, that the appeal was timely pursuant to 47 U.S.C. § 402(a).[2/] Petitioners claimed they were not appealing the grant of Mahaffey's applications; rather, they were only appealing those issues that dealt with the alleged anticompetitive conduct of Mahaffey, Airsignal, AAA, and Mobilfone. The FCC, supported by Mahaffey,[3/] moved to dismiss MMT's petition on the grounds that it involved a licensing matter and therefore could be

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2/ Section 402(a) allows for a larger period to file an appeal than does section 402(b).

3/ Mahaffey filed a Memorandum in Support of Motion to Dismiss with the Court of Appeals, attached hereto as Appendix B.

appealed only under Section 402(b) of the Communications Act.

The United States Court of Appeals for the District of Columbia Circuit agreed with the Commission and Mahaffey. On November 10, 1981, it granted the Commission's motion to dismiss MMT's petition for appeal, stating that "the order that petitioners seek to have us review was plainly an order granting applications for construction permits and was thus subject to appeal only under 47 U.S.C. § 402(b)(1), (6) (1976). Petitioners did not appeal within the thirty (30) day period set by id. § 402(c). Their appeal is therefore untimely." Order, No. 81-1973 (Nov. 10, 1981)[4/]

MMT and RTI now petition this court for a writ of certiorari, again claiming that the phases of the proceeding below

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4/ *This Order is attached hereto as Appendix C.*

are severable and separately appealable, and that the issues they wish to appeal are governed by 47 U.S.C. § 402(a). A careful examination demonstrates that these claims are without merit.

ARGUMENT

Section 402(c) of the Communications Act, 47 U.S.C. § 402(c), states that appeals under Section 402(b) "shall be taken by filing a notice of appeal with the court within thrity days from the date upon which public notice is given of the decision or order complained of" (Emphasis added). The Commission Order which MMT and RTI seek to have reviewed became effective on July 24, 1981. Thus, the appeal was due to be filed with the Court of Appeals on or before August 23, 1981. Petitioners' appeal was filed on August 28, 1981.

The failure of MMT and RTI to timely file their appeal affects the basic jurisdiction of the Court of Appeals. Rule 26(b) of the Federal Rules of Appellate Procedure specifically provides that:

> [T]he Court may not enlarge the time for filing a notice of appeal.... Nor may the Court enlarge the time prescribed by law for filing a petition to enjoin, set aside, suspend, modify, enforce or otherwise review, or a notice of appeal from an order of an administrative agency....

Petitioners have attempted to circumvent this basic jurisdictional requirement by claiming that they are only appealing one of the issues adjudicated below, and that this issue does not concern a licensing matter. Furthermore, they erroneously allege that the three "phases" of the proceeding below were actually distinct, separately appealable proceedings, and that the particular issue they

seek to have reviewed may be appealed under 47 U.S.C. § 402(a). These are all untenable contentions which do not correctly reflect the record of the proceedings below. The Commission's findings in phases I and III are not susceptible of appellate review because final orders of administrative agencies cannot be divided into distinct appealable matters. American Telephone and Telegraph Co. v. FCC, 602 F. 2d 401 (D.C. Cir. 1979).

Petitioners submit that the phase I issues are reviewable under § 402(a) while the phase III issues fall under § 402(b). Petition at 27. The applicable case law dispells this claim. A given FCC order may not be reviewed under both sections 402(a) and 402(b). National Association of Broadcasters v. FCC, 554 F. 2d 118 (D.C. Cir. 1976). Petitioners' attempt to separate the FCC

order in question violates this basic principle.

Even if the court were to accept Petitioners' basic premise that a given order could be appealable under both Sections 402(a) and 402(b), it must still reject Petitioners appeal on the facts of this case. The findings in phase I were actually an integral part of a licensing procedure. Such a procedure may be reviewed only by means of a proper appeal (under § 402(b)) of the FCC's grant of Mahaffey's application for construction permits. Thus, contrary to Petitioners' claim, the phase I findings cannot be reviewed separately under § 402(a) because they were merely subsidiary findings; they did not constitute a final order over which the court of appeals has jurisdiction.

MMT and RTI contend that the Commission divided the proceedings into separate phases because it realized that each

phase was of a distinct nature, phase I being an investigation and phase III being a construction permit application. Petition at 12-13. This claim misstates the record of the proceedings. The separate phases, to which petitioners repeatedly refer, represent a division of the proceedings for evidentiary purposes. The consolidated multi-party hearing was separated into three parts simply for administrative convenience and to avoid forcing parties to attend hearing sessions which dealt with issues in which they had no particular interest. At the prehearing conference, the presiding judge stated explicitly that the structuring of the proceedings into phase did not mean that the matters in issue were considered to be severable. The transcript of the prehearing conference, attached hereto as appendix D, contains the following:

> JUDGE NAUMOWICZ: . . . I do not think that anyone would

> object if we set up a hearing schedule for issue 1 [the so-called joint anticompetitive conduct issue] which would simply cover issue 1, but recognizing that the initial decision on issue 1 would be part of the overall initial decision in this consolidated proceeding.

The transcript demonstrates conclusively that the proceedings were divided for purposes of administrative convenience, not because the Commission viewed them as separate proceedings.

MMT and RTI contend that the Commission itself recognized the "separateness" of the three phases, based upon the fact that their standing as parties in phase III was terminated while standing in phase I was retained. Petition at 12-14. But, the termination of MMT's standing in phase III simply reflected the fact that MMT had a legitimate, cognizable interest in phase I issues (based upon its status as the alleged victim of anticompetitive

conduct), but not in the phase III issues (based upon the fact that MMT voluntarily withdrew its competing application). Both phases I and III involved radio licensing. MMT simply had no legally cognizable interest in the phase III radio licensing issues. Denying MMT standing in this regard in no way constituted a recognition by the FCC that the two phases were of a distinct nature for purposes of judicial review.

Petitioners' claim that the phase I issues were investigatory in nature, and may be separately under section 402(a). However, the record indicates that phase I was part of the Commission's inquiry into the desirability of granting Mahaffey's application, and not a separate investigation. Hearings concerning alleged anti-competitive behavior are an integral part of the FCC's licensing function - they are held to determine

whether an applicant is qualified to be a licensee. The question of anti-competitive behavior is relevant to the determination of whether a grant of a license application would be in the public interest, since the public interest has an "antitrust component".[5] See, e.g., National Association of Regulatory Utility Commissioners v. FCC, 525 F.2d 630, 636 (D.C. Cir. 1976), cert denied, 425 U.S. 992 (1976).

It is important to note that the issues in phases I and III derived from a single designation order.[6] The ultimate issue contained in the designation order in Docket Number 20871 sought:

> To determine in light of the evidence adduced pursuant to issued (1) (2) and (3) above[7]

5/ However, it is not the function of the FCC to enforce the antitrust laws. United States v. FCC, 652 F. 2d 72, 87-88 (D.C. Cir. 1980) (en banc).

6/ See Appendix A, Docket Number 20871 (August 4, 1976), 41 Fed. Reg. 32644 (1976).

7/ The referenced issues (1), (2) and (3) include the phase I issues.

> whether the public interest, convenience and necessity will be served by a grant of any or all of the applications of Mahaffey Message Relay, Inc. in whole or in part.

Based upon this designated issue, it is clear that the phase I inquiry involved a radio licensing matter, squarely within the purview of section 402(b) for purposes of judicial review. Moreover, the legal authorities under which the Commission designated the hearing were sections 309(d) and (e) of the Communications Act, 47 U.S.C. §§ 309(d), (e).[8/] Those sections constitute the essence of the FCC's radio licensing function - to consider applications for construction permits or licenses.

8/ *The Commission referred only to Sections 309(d) and (e) as its authority to designate for hearing* see Appendix A, at § 16. *Thus, there is no basis for Petitioners' assertion, at pages 16-17 of the Petition, that the hearing on the phase I issues was conducted pursuant to the FCC's investigative or adjudicatory powers under 47 U.S.C. § 403 or 47 U.S.C. § 208, and was not related to the Commission's licensing power. Such an assertion is at odds with the language of the order.*

The jurisdiction of the court of appeals can be invoked "to enjoin, set aside, suspend (in whole or in part), or to determine the validity of - (1) all final orders of the [FCC]...." 28 U.S.C. § 2342 (Jurisdiction of the Court of Appeals) (Emphasis added). This fact provides further support for the proposition that Petitioners cannot be granted appellate review of phase I findings only, since those findings did not represent a "final order". Rather, they were merely factors in the Commission's decision to grant Mahaffey's application. Thus, since the grant of Mahaffey's application was not challenged (since by doing so Petitioners would lose their argument that they were not appealing a licensing decision), MMT and RTI are challenging a mere subsidiary finding, which is not susceptible of appellate review.

The United States Court of Appeals for the District of Columbia Circuit has previously ruled that a challenge to a finding contained in an FCC order that does not contest the order itself is not susceptible of judicial review. American Telephone and Telegraph Co. v. FCC, 602 F. 2d 401 (D.C. Cir. 1979). In that case the court found that:

> ...Congress explicitly limited our review to agency orders. If we were to construe that term to encompass every agency move which might cause someone future harm, we would in effect be reading the congressional limitation out of existence.... Such a reading would be entirely implausible. It would cause considerable mischief. It would in effect permit the Courts of Appeals at the whim of parties not otherwise aggrieved to scrutinize administrators' passing remarks, overturn their subsidiary factual determinations, and stalk their every step along alternative paths of reasoning. 602 F. 2d at 409.

In light of this precedent, the Petitioners cannot disclaim an interest in appealing

the grant of the authorization of Mahaffey, and still seek to challenge the findings pertaining thereto.

In the proceedings below, the FCC granted Mahaffey's application for construction permits. Petitioners may attack an order of the Commission that grants such an application only in the manner prescribed by Congress: by the filing of a notice of appeal in the United States Court of Appeals for the District of Columbia Circuit, under Section 402(b) of the Communications Act, within thirty days of the public notice of the Commission's final order. See 47 U.S.C. § 402(c). Although Petitioners filed in the correct court,9/ their request for appellate review

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9/ Petitioners contend that the distinction between sections 402(a) and 402(b) is one of forum selection, and that since they sought review in the United States Court of Appeals for the District of Columbia Circuit, which may be a proper forum for either a 402(a) or a 402(b) appeal, no party can complain that they are guilty of forum shopping. Mahaffey does not dispute this claim. The problem is that the claim is frivilous - the issue is not one of forum shopping but rather one of timeliness. It is insignificant that the appeal was filed in the proper court since it was not filed on time.

was not made in the requisite time. MMT and RTI cannot escape the consequences of an untimely filing by claiming the order may be reviewed under section 402(a).10/ Since a timely appeal was not taken, the court of appeals did not have jurisdiction to review the order. The petition for review was property dismissed.

The two principal authorities relied upon by Petitioners provide no support for the position they are advocating. At pages 26 through 28, Campos v. FCC, 650 F. 2d 890 (7th Cir. 1981), is cited as authority for the proposition that section 402(b) must be narrowly construed. Petitioners can find no comfort in this precedent because the case is clearly distinguishable on its facts. Radio common carrier licenses were not at issue in Campos.

10/ Section 402(a) petitions must be filed within 60 days of the date of public notice. Petitioners do not contend that their filing would have been timely under § 402(b).

Rather, individuals were challenging restrictions concerning the issuance of commercial operators licenses.[11] Such licenses are not clearly included in any of the categories enumerated in section 402(b). In contrast, the instant case involves radio licensing and thus falls precisely within a section 402(b) category. Thus, section 402(b) need not be construed broadly to conclude that it governed Petitioners' appeal.

At pages 28 through 29, Petitioners cite at length excerpts from Scripps-Howard Radio v. FCC, 316 U.S. 4 (1942), for the proposition that the distinction between sections 402(a) and 402(b) is one of forum selection. However, as discussed at page supra, forum selection is not an issue here. The issue is one of timeliness, and the fact that review was

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11/ An operators license is issued to certify that an individual is qualified to perform various technical and engineering tasks.

sought in the proper court does not give that court jurisdiction to consider an untimely appeal.

Petitioners also contend that the dismissal order of the court of appeals was erroneous as a matter of law because it unjustly deprived them of their right of judicial review. This is a frivilous claim. Petitioners were not deprived of their right to judicial review - they had thirty days in which to file their appeal. By missing the filing deadline they waived their right to judicial review.

Finally, petitioners submit that the court of appeals miscontrued the applicability of section 402(b). Petition at 38-39. They contend that they were not "persons aggrieved" or persons whose interests were "adversely affected" by any order of the Commission granting or denying any application. 47 U.S.C. §§ 402(b)(6). However, the record clearly

demonstrates that petitioners' were indeed "aggrieved" on "adversely affected" by the Commission's grant of Mahaffey's application. Since only final orders of the FCC can be appealed, and since the final order in this case granted a license application, MMT and RTI cannot legitimately claim that the order they appealed did not grant or deny an application. See pages 9-10, supra. Furthermore, MMT filed competing applications for many of the frequencies in the Memphis area. The grant of Mahaffey's application directly affected MMT's capability to provide radio common carrier services in the Memphis Market.

CONCLUSION

For the reasons stated herein, Mahaffey believes that the United States Court of Appeals for the District of Columbia Circuit properly dismissed MMT

and RTI's petition for appellate review. Hence, a writ of certiorari should not issue to the judgment and orders of the court of appeals.

Respectfully submitted

Norman E. Jorgensen

Kadison, Pfaelzer,
Woodard, Quinn &
Rossi
1229 19th Street, N.W.
Washington, D.C. 20036
(202) 452-8300

Appendix

APPENDIX A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

C
FCC 76-647
41431

In the Matter of	)	
	)	
MAHAFFEY MESSAGE RELAY, INC. Memphis, Tennessee	)	Docket No. 20871 File No. 8331-C2-P-(8)-73 8557-C2-P-(4)-73 21635-CD-P-75
	)	
MEMPHIS MOBILE TELEPHONE, INC. Memphis, Tennessee	)	Docket No. 20872 File No. 20003-CD-P-76
	)	
For Construction Permits for facilities in the Domestic Public Land Mobile Radio Services to operate in Memphis, Tennessee.	)	

MEMORANDUM OPINION AND ORDER

Adopted: July 7, 1976 ; Released: August 4, 1976

By the Commission: Commissioner Robinson absent.

1. The Commission has under consideration the above-captioned mutually exclusive applications of Mahaffey Message Relay, Inc., (Mahaffey) and Memphis Mobile Telephone, Inc. (MMT) for construction permits in the Domestic Public Land Mobile Radio Service (DPLMRS) in the Memphis, Tennessee metropolitan area. Also before the Commission are various pleadings filed by MMT directed against Mahaffey 1/ and two of the

1/ Petition for Leave to Intervene, Petition to Deny and Petition for Waiver of the Cut-Off Rules filed by MMT May 19, 1975; Complaint, Petition to Deny and Motion to Dismiss Applications filed by MMT October 21, 1975; Mahaffey's Oppositions and MMT's replies. MMT's various pleadings do not fully satisfy our procedural rules and have been challenged on this ground; however, as indicated in our subsequent discussion, they treat matters of concern. Consequently, we accept them as informal objections pursuant to Section 1.41 of the Commission's Rules, and will deal with them on their merits.

other applicants 2/ for frequencies in this area; a "Motion for Reconsideration" filed by MMT August 28, 1975; and an "Application for Review" filed by MMT November 3, 1975.

2. MMT alleges that during the spring of 1973 - soon after it informed Mahaffey of its intention to seek state certification to provide radio common carrier service - Mahaffey and Otis Hale d/b/a Mobilfone filed applications for the available 450 MHz frequencies in the Memphis service area 3/, and that both applicants knew that before MMT could receive state certification the 60-day cut-off provisions of our rules 4/ would prevent it from filing any subsequent competing 450 MHz applications. MMT alleges further that Mahaffey's motivation and lack of good faith in filing its applications is evidenced by a subsequent agreement among all of the other Memphis applicants for radio common carrier frequencies which eliminated frequency conflicts while still blocking MMT's possibility of applying for 450 MHz frequencies. In that agreement, Mahaffey abandoned six of the twelve 450 MHz frequencies applied for in its original applications but maintained its later-filed one-way applications for the only remaining spectrum space available for radio common carrier use in the Memphis area. Finally, MMT alleges that all of Mahaffey's filings did not satisfy the need provisions of Section 21.516 of the Rules 5/, and should therefore be rejected without a hearing.

2/ Against AAA Answerphone, Inc. - Jackson, a Complaint, Petition to Deny and Motion to Dismiss Applications filed November 3, 1975, and against Airsignal International, Inc., a Motion to Dismiss as amended March 18, 1976. Both respondents filed timely oppositions.

3/ Mahaffey currently operates both a one-way paging facility (KRS-656), and a two-way facility (KDT-223) in Memphis, Tennessee, as well as two-way facilities in Munford (KUO-621) and Collierville (KUC-870), Tennessee. It appears that all of Mahaffey's stations provide service primarily to Memphis metropolitan area subscribers.

4/ Sections 21.30(b) and 1.227(b)(3) of the Rules provide essentially that in DPLMRS, no application will be considered mutually exclusive with another application unless such application is tendered for filing within 60 days after the public notice listing the first prior-filed application, with which subsequent applications are in conflict, as having been accepted for filing.

5/ Section 21.516 requires an applicant for additional facilities to show that there is an unsatisfied need for the additional service, and that the applicant's present facilities are inadequate to serve that need.

3. For reasons set forth below, we are concerned that Mahaffey may have filed applications to protect and benefit its existing licensees. Therefore, the evidentiary hearing required by the mutually exclusive applications will be expanded to include an appropriate issue (issue 2) relating to Mahaffey. Questions have also been raised about the possible involvement of other applicants in this area. Accordingly, we will make the other Memphis-area applicants (Otis Hale d/b/a Mobilfone; AAA Answerfone, Inc. - Jackson; and Airsignal International, Inc.) 6/ respondents to this proceeding (issue 1). We assume that these applicants will take advantage of this opportunity to participate in the present hearing. In the event that they do not participate, it would be difficult to avoid drawing adverse inferences about the bona fides of their applications.

THE CONFLICTING APPLICATIONS

4. Between May and July, 1973, Mahaffey, Otis Hale, AAA and Airsignal filed 450 MHz applications proposing new and additional facilities to serve areas contiguous to the Memphis metropolitan service area; additionally, AAA filed for a low-band paging frequency (33.58 MHz) in the same general area. In December, 1975, the applicants requested that various proposals for conflicting frequencies be deleted from their applications (see para. 6 below). Meanwhile, on May 4, 1975, MMT had received its Tennessee state certification, and on May 19, 1975, Mahaffey filed two applications for the only remaining frequencies in the service area (43.58 and 43.22 MHz). On July 1, 1975, MMT filed a competing application for 43.58 MHz. Airsignal also filed an application for this frequency, but dismissed it in December, 1975.

5. On May 19, 1975, MMT tendered an application for four of the 450 MHz frequencies Mahaffey had applied for in May, 1973. At the same time, MMT Petitioned for Leave to Intervene, to Deny Mahaffey's 450 MHz applications, and requested a waiver of the cut-off rules. MMT's application was returned as untimely filed after preliminary staff review (see footnote 4). On August 28, 1975 MMT resubmitted its 450 MHz application with a "Petition for Reconsideration". The application was again returned, and on November 3, 1975, MMT submitted an "Application for Review" apparently under the misconception that the second return of its application was the dismissal by delegated authority of its reconsideration request 7/. Because we grant part of the

6/ The applications are: AAA - F.C.C. File No. 20032-C2-P-(4)-74; Airsignal - F.C.C. File No. 20076-C2-P-(4)-74; Otis Hale - F.C.C. File No. 8942-C2-P-(2)-73.

7/ Section 21.28(d) of the Rules provides for the return without prejudice of applications received after the dates prescribed in Section 21.30(b) of the Rules. This application will be eligible for refiling only after a final decision is rendered by the Commission with respect to the present applications or after the dismissal or removal of the present applications from this hearing.

relief requested in MMT's May 19, 1975 "Petition to Intervene", it is included in our discussion of MMT's other informal pleadings directed at Mahaffey's filings. Other than this, however, there is no reason to grant MMT's requests and they will therefore be denied.

THE AGREEMENT

6. On December 8, 1975, AAA, Airsignal, and Mahaffey amended their pending applications by deleting various frequency conflicts in order to avoid a Commission hearing. On February 4, 1976, MMT filed an informal protest which questioned whether these amendments were "major" amendments requiring Public Notice pursuant to Section 21.26(c) of the Rules. The amended applications were not placed on Public Notice nor were they treated as "major" amendments by our staff. We affirm this ruling since these amendments did not materially alter the nature of the service proposed by the amending applicants, and are not otherwise "major" within the terms of Section 21.23 of the Rules.

7. We have been concerned that predesignation agreements between mutually exclusive applicants to withdraw one or more competing applications could be improperly motivated. As we stated in the Notice of Proposed Rule Making in Docket No. 19905 8/.

> Close review of such agreements is considered important in discouraging the filing of 'strike' applications or unreasonable 'buy outs' of competition. Consequently, we propose to dismiss an application withdrawn pursuant to an agreement and to continue processing the remaining application only if the withdrawal agreement is found to be consistent with the public interest 9/

The applicants participating in the present agreement submitted a recitation of the circumstances leading to the agreement; nonetheless, the circumstances which require hearing to examine the anti-competitive questions raised by MMT necessarily concern any agreements between Mahaffey and the other radio common carrier applicants. And the

8/ 44 F.C.C. 2d 556 (1973).

9/ Id at 558.

consideration of avoiding a hearing voiced by the 450 MHz applicants must be considered in the context of MMT's allegations regarding their alleged cooperation in blocking MMT's possibility of entry into this market. Accordingly, we are adding an appropriate issue to explore the background of the agreement.

AAA

8. On November 5, 1975, MMT filed a "Petition to Deny" AAA's application stating that although AAA's application represents that it intends to locate and serve the residents of DeSoto County from Southaven, Mississippi, AAA in fact intends to extend its marketing efforts into the Memphis service area in violation of Tennessee law and its Mississippi Public Service certification. Further, MMT contends, AAA does not show a need for four new 450 MHz frequencies and its proposed one-way paging frequency on the basis of the small service area of DeSoto County, Mississippi. AAA opposed the MMT filing as untimely since it came nearly two years after acceptance of AAA's applications for filing. Further, AAA contends that it intends to serve only the Northern Mississippi service area (the population of which is approximately 42,000). If AAA decides to serve any other state, it contends, it will obtain the necessary certificates to ensure compliance. MMT's filing is procedurally defective; moreover, the contemplated hearing will investigate AAA's participation in alleged anti-competitive conduct. Accordingly, we will deny MMT's "Petition to Deny" in all other respects.

AIRSIGNAL

9. On March 18, 1976, MMT filed an amended "Petition to Deny" Airsignal's application. MMT contends that Airsignal misrepresented its intended service area when it filed for frequencies at West Memphis, Arkansas, since it fully intended to serve Western Tennessee and Memphis; that Airsignal has sought by filing competing applications to restrain trade in this service area; and that Airsignal did not have an Arkansas Public Service Commission (APSC) certificate when it filed its application in June, 1973, and that a subsequent application before the APSC has been dismissed for failure to prosecute. Airsignal relies upon its original representation that it would provide two-way service to the Memphis-West Memphis service area on a non-interconnect basis, which does not require Arkansas state certification, and states that the dismissal of its application by APSC was the result of its decision not to prosecute the application rather than an attempt to defraud this Commission. MMT's petition is insufficient to raise character issues against Airsignal; however, as with AAA, we desire a further investigation into Airsignal's participation in the alleged anti-competitive conduct Therefore, we will deny MMT's "Petition to Deny" except to the extent indicated above.

MAHAFFEY

10. MMT filed protests against both Mahaffey's paging and 450 MHz applications. MMT states that Mahaffey, in collusion with other radio common carrier applicants, has persistently blocked the entry of any potential competition into the Memphis metropolitan market by using the cut-off provisions of the Commission's rules in conjunction with the Commission's requirement that an applicant obtain a valid state authorization before filing. MMT alleges that Mahaffey violated Section 21.516 of the Commission's Rules which requires justification for the additional applications by providing a valid, channel loading survey and evidence of need for the additional service. MMT contends Mahaffey has not done this, and that the only basis for the Mahaffey filings was to block MMT. MMT requests denial of Mahaffey's applications or, in the alternative, that it be allowed intervention pursuant to Section 1.223(d) of the Rules 10/ as a competing applicant with Mahaffey's 450 MHz applications by granting its request for a waiver of the cut-off provisions of the rules. MMT complains further that Mahaffey's applications also violate Section 1.726 of the Rules 11/ and deliberately committed acts of discrimination and unreasonable preference. Moreover, MMT urges that Mahaffey disregarded Section 21.516 of the Rules when it filed for the two additional one-way frequencies for Collierville and Munford with so few subscribers using those channels.

11. Aside from the limited intervention we are allowing with regard to Mahaffey's 450 MHz applications (see footnote 9), MMT's pleadings have not shown good cause to justify either the denial of Mahaffey's applications or a waiver of the cut-off provisions of the rules. MMT's request essentially rely upon alleged violations of Section 21.516 of the Rules, and Mahaffey's participation in the alleged anticompetitive activity. As indicated, these matters will be explored in the hearing ordered herein and MMT will be able to

10/ Section 1.223(d) applies to intervention by parties in interest after applications have been designated for hearing. Rather than require MMT to request formal intervention after this Order is released, we will waive the requirement and allow MMT to intervene and present evidence relating to Mahaffey's 450 MHz applications.

11/ Section 1.726 requires that formal complaints alleging such matters as discrimination or unreasonable preference must specify the carrier and a description of the particular acts relied upon which constitute a violation of the Communications Act.

participate thereon. Finally, we will deny MMT's request for a waiver of the cut-off provisions of the rules since we are not as yet satisfied that MMT has been the victim of anti-competitive conduct. Moreover, if we granted MMT's request it in turn would be cut off from other possible applications, and thereby could obtain an unjustified preferred position. Compare Fort Harrison Telecasting Corporation v. Federal Communications Commission, 297 F. 2d 779. (D.C. Cir. 1961)

CONCLUSIONS

12. We agree with MMT that Mahaffey's channel-loading surveys should be scrutinized in the hearing and if they are found insufficient, the applications should be denied. In light of the small number of subscribers on its existing two-way facilities and the events MMT alleges which preceeded the Mahaffey filings, we will require Mahaffey under issue (3) to support further the need for additional two-way facilities. Empire Communications Co., 40 F.C.C. 2d 329 (Rev. Bd. 1974).

13. Additionally, we are not persuaded that sufficient need exists for the additional low-band one-way facility proposed at Collierville, Tennessee by Mahaffey. And we note that Mahaffey, has been granted the additional use of one-way facilities in the same general service area. 12/ Therefore, we will require that Mahaffey under issue (3) support the need for this additional one-way facility and demonstrate the incapability of the existing one-way and two-way facilities to provide the proposed service.

14. We question Mahaffey's good faith in originally filing for nearly all the 450 MHz frequencies available, and especially the filing of the two additional applications for the only remaining RCC spectrum space available immediately after MMT obtained its required state authorization. Consequently, we will include an issue to determine the facts and circumstances surrounding Mahaffey's filing of additional applications for nearly all of the available 450 MHz frequencies and the lowband one-way frequencies in the Memphis metropolitan market.

12/ Mahaffey was granted potential shared use of frequency 158.72 MHz with Airsignal in Docket 19801 (FCC 75M-1695, released October 3, 1975, recon. denied FCC 75R-434, released Nov. 25), and its application for 43.22 MHz at Munford was granted July 8, 1975 (KMT-893).

15. In view of the foregoing, the Commission finds that Mahaffey Message Relay, Inc., and Memphis Mobile Telephone, Inc., are legally, technically, financially, and otherwise qualified to receive a grant of their above-captioned applications except for the issues set forth below.

16. Accordingly, IT IS ORDERED, That pursuant to Sections 309(d) and (e) of the Communications Act of 1934, as amended, the above-captioned applications of Mahaffey Message Relay, Inc., and Memphis Mobile Telephone, Inc., are designated for hearing in a consolidated proceeding upon the following issues:

(1) To determine whether Mahaffey Message Relay, Inc., AAA Answerphone-Jackson, Airsignal International, Inc., and Otis Hale d/b/a Mobilephone have jointly engaged in conduct intended to prevent the filing of competing applications for radio common carrier frequencies in the greater Memphis, Tennessee metropolitan area.

(2) To determine the facts and circumstances surrounding Mahaffey's filing of applications for 450 MHz and lowband one-way frequencies in the Memphis metropolitan market subsequent to January 1, 1973.

(3) To determine the nature and extent of the services now rendered by Mahaffey Message Relay, Inc., and the capacity of its existing facilities in light of Section 21.516(b) of the Commission's Rules and Regulations.

(4) To determine the nature and extent of the services proposed by Mahaffey Message Relay, Inc., and Memphis Mobile Telephone, Inc.

(5) To determine the total area and population to be served by Mahaffey Message Relay, Inc., and Memphis Mobile Telephone, Inc., within the 43 dbu contour of each proposed station based upon the standards set forth in Section 21.504 of the Commission's Rules and Regulations, and to determine the need for the proposed service in that area.

(6) To determine, in light of the evidence adduced pursuant to issues (1)(2) and (3) above, whether the public interest, convenience and necessity will be served by a grant of any or all of the applications of Mahaffey Message Relay, Inc., in whole or in part.

(7) To determine, in consideration of all the evidence adduced under the proceeding issues, whether the public interest, convenience or necessity will be served by a grant of either the application of Mahaffey Message Relay, Inc., or the application of Memphis Mobile Telephone, Inc., for authority to operate on 43.58 MHz.

17. IT IS FURTHER ORDERED, That the burden of proof on issues (1), (2) and (3) is placed on the respective parties named therein, and on issues (4) and (5) the burden of proof is placed jointly on the competing applicants named under those issues.

18. IT IS FURTHER ORDERED, That the hearing ordered herein shall be held at a place and time to be specified in a subsequent order of the Chief Administrative Law Judge.

19. IT IS FURTHER ORDERED, That the Chief, Common Carrier Bureau is made a party to the proceeding.

20. IT IS FURTHER ORDERED, That AAA-Answerphone Inc.-Jackson; Airsignal International, Inc.; and Otis Hale d/b/a Mobilephone ARE MADE respondents to this hearing for the purpose of participating with respect to issue (1) above.

21. IT IS FURTHER ORDERED, That the parties herein may avail themselves of an opportunity to be heard by filing with the Commission pursuant to Section 1.221(e) of the Rules within twenty (20) days of the release date of this Memorandum Opinion and Order, a written notice stating an intention to appear on the date set for hearing and present evidence on the issues specified.

FEDERAL COMMUNICATIONS COMMISSION

Vincent J. Mullins
Secretary

APPENDIX B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE

DISTRICT OF COLUMBIA COURT

MEMPHIS MOBILE TELEPHONE, INC.	)	
and	)	
RADIO TELEPHONE INDUSTRIES, INC.	)	
(Petitioners)	)	
v.	)	Case No. 81-1973
FEDERAL COMMUNICATIONS COMMISSION	)	
and	)	
UNITED STATES OF AMERICA	)	
(Respondents)	)	

MEMORANDUM OF MAHAFFEY
MESSAGE RELAY, INC. IN
SUPPORT OF MOTION TO DISMISS

Mahaffey Message Relay, Inc. (Mahaffey),[1/] by its attorneys, hereby files a Memorandum in support of the "Motion to Dismiss" (Motion) of the Federal Communications Commission (FCC) directed against the "Petition for Review" (Petition) of Memphis Mobile Telephone Company, Inc. (MMT) and Radio Telephone Industries, Inc. (RTI) in the above cause. The following is respectfully shown:

1/ Mahaffey timely filed a "Petition for Leave to Intervene" in the proceeding on September 17, 1981.

APPENDIX C

United States Court

FOR THE DISTRICT OF COLUMBIA

No. 81-1973

Memphis Mobile Telephone, Inc., et al

Petit

v.

Federal Communications Commission and United States of America,

Respondents

BEFORE: Wald, Mikva and Edwards*, Circuit Judges

O R D E R

Upon consideration of respondent's motion to dismiss, intervenor's memorandum in support thereof, petitioner's response, and respondent's and intervenor's replies, it is

ORDERED by the Court that the motion is granted and the petition for review is dismissed. The order that petitioners seek to have us review was plainly an order granting applications for construction permits and was thus subject to appeal only under 47 U.S.C. § 402(b)(1), (6) (1976). Petitioners did not appeal within the thirty (30) day period set by id. § 402(c). Their appeal is therefore untimely.

Per Curiam

*Circuit Judge Edwards did not participate in this order.

UNITED STATES OF AMERICA

APPENDIX D

FEDERAL COMMUNICATIONS COMMISSION

Stenographic Transcript Of

HEARINGS

IN THE MATTER OF: MAHAFFEY MESSAGE RELAY, INC.
Memphis, Tennessee — Docket No.

MEMPHIS MOBILE TELEPHONE
Memphis, Tennessee — Docket No.

RADIO TELEPHONE INDUSTRIES, INC. — Docket No.

PLACE: WASHINGTON, D.C.

DATE: January 19, 1977

VOLUME: 1

PAGES: 1 thru 59

FEDERAL DATA RETRIEVAL SYSTEMS, INCORPORATED
4931 Bethesda Avenue
Bethesda, Maryland 20014

you can get out of the way today, that is fine.

MR. MAYER: Yes, sir, but I just wanted to make you aware that this is proceeding at the same time as the interrogatories.

JUDGE NAUMOWICZ: Anything else we should discuss before we go about setting up dates?

MR. BECKER: Your Honor, do you contemplate any procedure whereby issue 1 could be disposed of expeditiously?

JUDGE NAUMOWICZ: Let me see. Issue 1.

MR. BECKER: That is the only issue which involves the Respondent-parties, the parties labeled as Respondents in the hearing order.

Those Respondent-parties do not have applications in this proceeding and are only in the proceeding for issue 1 and one of your earlier decisions indicated there might be a possibility of a procedure whereby issue 1 could be handled expeditiously.

JUDGE NAUMOWICZ: I am a little bit reluctant at this time to use the word "expeditiously" in the sense that we would contemplate an early decision on issue 1 rather than the other issues.

The Commission has had occasion to address itself to that quite recently in the RKO-New York proceeding. It indicated it did not want to do that.

However, I do not think that anyone would object if

we set up a hearing schedule for issue 1, which would simply cover issue 1, but recognizing that the initial decision on issue 1 would be part of the overall initial decision in this consolidated proceeding.

In other words, we may get issue 1 out of the way, let us say, in 90 days, but you would not expect a decision on that as if it were the only issue in the case. It would be quite some time down the line before you got your decision.

MR. BECKER: Yes, Your Honor. My point was solely on proceeding with the evidence.

JUDGE NAUMOWICZ: Does anybody have any problem with cutting issue 1 out for the purpose of taking evidence on it?

MR. JORGENSEN: Well, I had a suggestion for a procedure, Your Honor, that accords with your ruling or at least the subject discussed here.

I foresaw the entire hearing, once consolidated, as sort of a three part hearing. I would agree with Mr. Becker that issue 1 should be heard first.

The second part of the hearing, I would it to be the docket that deals with Radio Telephone Industries, Inc. and allow the comparative proceeding to be the third phase of the proceeding.

I do not know how that strikes other parties, but it seemed like a very logical and sensible division, to me.

MR. MAYER: The Bureau would have no objection to

that procedure, Your Honor.

MR. BLOOSTON: Your Honor, as I envision what Mr. Jorgensen has suggested, it would be in accordance with your earlier statement that the parties not interested in other issues may absent themselves.

As I see the proceeding, after you take evidence on issue 1 and complete that phase, then the Respondents from then on would not have to participate in any other phase of the proceedings if they did not want to.

JUDGE NAUMOWICZ: That would seem so to me, Mr. Blooston, but again that would be up to each one of the parties as to what phases they want to be in and what phases they want to be out of. They have a right to be in everything.

All right. Shall we go off the record and discuss scheduling?

(Nodding of heads.)

JUDGE NAUMOWICZ: We are off the record now.

(Discussion was held off the record.)

JUDGE NAUMOWICZ: Back on the record.

Mr. Miller, perhaps you would like to note your appearance at this time.

MR. T. MILLER: Yes. I am Terrence Miller. I am an officer of Memphis Mobile Telephone and Radio Telephone Industries in Memphis, Tennessee.

JUDGE NAUMOWICZ: All right. Let the record show that

Opposition

2

Office - Supreme Court, U.S.
FILED
MAY 6 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1660

In the Supreme Court of the United States

OCTOBER TERM, 1981

MEMPHIS MOBILE TELEPHONE, INC., ET AL.,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1660

MEMPHIS MOBILE TELEPHONE, INC., ET AL.,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

1. In 1973, four radio common carriers filed applications with the Federal Communications Commission ("FCC") seeking permits for construction of two-way mobile communication base stations in the Memphis, Tennessee, area.[1] These applications were

[1] The four carriers were Mahaffey Message Relay, Inc., AAA Anserphone, Inc.-Jackson, Airsignal International, Inc., and Otis L. Hale d/b/a Mobilfone Communications. A two-way mobile communication base station is a transmitter at a fixed location designed to provide two-way communications with mobile transmitting units, such as car telephones and two-way radios.

mutually exclusive because of frequency conflicts among them. In 1975, one of these radio common carriers, respondent Mahaffey Message Relay, Inc. ("Mahaffey"), and the petitioner Memphis Mobile Telephone, Inc. ("MMT") also filed mutually exclusive applications for one-way signalling stations in the Memphis area.[2] *Mahaffey Message Relay, Inc.*, 79 F.C.C.2d 399, 400-402 (1980).[3] Also in 1975, the four two-way applicants eliminated the frequency conflicts among their applications by agreement. MMT thereafter filed pleadings with the FCC claiming that the four applicants had acted anticompetitively in reaching that agreement.[4] In 1976, the Commission designated Mahaffey's two-way applications and the conflicting one-way applications of Mahaffey and petitioner MMT for hearing. The issues designated were whether the four applicants for two-way permits had engaged in the anticompetitive activities that MMT had alleged, and the merits of the various one- and two-way applications. 41 Fed. Reg. 32644, 32646 (1976).[5] In a separate order, the Commission des-

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[2] A one-way signalling station is used to transmit communications by radio to portable "pagers" or "beepers."

[3] The decision of the Federal Communications Commission Review Board is reported at 79 F.C.C.2d 399.

[4] Petitioners considered themselves potential competitors of the four two-way applicants, although they had no competing applications pending at the time of agreement. See *Mahaffey Message Relay, Inc.*, 79 F.C.C.2d 414, 433-435 (1979). (The Initial Decision of the Administrative Law Judge is reported at 79 F.C.C.2d 414.)

[5] Although the two-way permit applications of the other three applicants were not directly before the Commission in the proceeding initiated (see 79 F.C.C.2d at 400), the applicants were joined as respondents by the Commission so as to afford them an opportunity to be heard in response to the

ignated for hearing certain complaints filed by petitioner Radio Telephone Industries, Inc. and others that respondent Mahaffey had refused to provide service to certain customers. 41 Fed. Reg. 44737 (1976).

An Administrative Law Judge ordered these cases consolidated. He divided the consolidated proceeding into three phases "as a matter of procedural convenience," so that parties could attend only those portions of the hearings in which they had an interest. 79 F.C.C. 2d at 417. Phase I dealt with MMT's allegations of anticompetitive conduct; Phase II with the complaints about Mahaffey's refusal to provide service; and Phase III with the merits of the various construction permit applications.[6]

After hearings, the ALJ issued an initial decision. The ALJ determined that the 3-phase structure that he had used for the hearings was not suited for issuance of a decision, and instead organized his findings of fact and conclusions of law to correspond to the two designation orders. 79 F.C.C.2d at 418. With respect to the issues framed by the first designation order, the ALJ found no evidence of anticompetitive conduct; he also ruled that Mahaffey's one-way and two-way permit applications should be granted. 79 F.C.C. at 419-469, 497-500, 502. On consideration of the issues framed by the second designation order, the ALJ determined that Mahaffey had imposed unreasonable equipment maintenance requirements and directed that Mahaffey undertake certain remedial actions. 79 F.C.C.2d at 469-496, 500-503.

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allegations of anticompetitive practices. 41 Fed. Reg. 32645 (1976).

[6] MMT's application for a one-way signalling station was withdrawn and ultimately dismissed. 79 F.C.C.2d at 402 n.3.

The Commission's Review Board affirmed, granting the construction permits. 79 F.C.C. 2d at 410-411. In so doing, it agreed with the ALJ that Mahaffey had not, either by itself or in concert with the other applicants for permits, engaged in disqualifying anticompetitive conduct. *Id.* at 406. The Commission declined to review the Review Board's decision (Pet. App. 4a-6a).

Thirty-nine days later, invoking 47 U.S.C. 402(a), petitioners filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit, pressing their claims of anticompetitive conduct. The Commission moved to dismiss on the ground that the order in question was reviewable only under 47 U.S.C. 402(b), which requires that appeals be filed within 30 days. The court dismissed the petition (Pet. App. 1a-2a). The court stated (*ibid.*): "The order that petitioners seek to have us review was plainly an order granting applications for construction permits and was thus subject to appeal only under 47 U.S.C. § 402(b)(1), (6) (1976). Petitioners did not appeal within the thirty (30) day period set by [47 U.S.C.] § 402(c). Their appeal is therefore untimely."

2. The decision of the court of appeals is clearly correct. It does not raise any issue requiring resolution by this Court and does not conflict with a decision of any other court of appeals. The petition for a writ of certiorari should accordingly be denied.

This case is governed by the plain language of the statute. Section 402(a), under which petitioners brought their petition for review, is a residual clause that confers jurisdiction upon the courts of appeals to review "any order of the Commission * * * except those appealable under subsection (b) of this section

* * *." Section 402(b) confers jurisdiction upon the United States Court of Appeals for the District of Columbia Circuit to hear eight categories of appeals, including those taken "[b]y any applicant for a construction permit * * * whose application is denied by the Commission" (47 U.S.C. 402(b)(1)) or "[b]y any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraph [ ] (1) * * *" (47 U.S.C. 402(b)(6)). Appeals falling within any of the eight categories covered by Section 402(b) must be commenced by filing of a notice of the appeal within 30 days of announcement of the Commission action sought to be reviewed. 47 U.S.C. 402(c). Review under Section 402(a), when available, may be sought within 60 days of the agency order. See also 28 U.S.C. 2344.

The Commission's order grants respondent Mahaffey construction permits, and petitioners claim to be aggrieved by it. Petitioners' petition for review was accordingly untimely. Petitioners argue (Pet. 26-27), however, that because the Commission's decision not only granted construction permits but also addressed other issues, the various issues underlying the order are severable and those issues not relating to the technical merits of the construction permit applications are reviewable under Section 402(a). Specifically, petitioners claim that because the hearings were divided into "phases," the appeal should also be fragmented along those lines.[7]

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[7] In fact, the "phases" to which petitioners refer were created only for convenience during the hearing stage. The agency did not separate the competition issue from the technical merits of the applications in either the designation orders or the ALJ's and Review Board orders.

Petitioners cite no authority for this position, and their contentions are irreconcilable with the plain language of the statute. The sole order from which they appeal is clearly an "order of the Commission granting or denying an[ ] application [for a construction permit]." 47 U.S.C. 402(b)(6). The fact that the Commission's decision also addresses other issues does not make it any less "an order granting [construction permits]."[8] Moreover, the issues that petitioners seek to sever—the existence of anticompetitive conduct—were directly relevant to the ultimate grant of the construction permits. Thus, petitioners seek impermissibly to challenge a finding in a Commission order without challenging the order itself by the prescribed route. See, *e.g.*, *American Telephone & Telegraph Co.* v. *FCC*, 602 F.2d 401, 407-409 (D.C. Cir. 1979). The plain language of the statute precludes the fragmented system of review that petitioners advocate.[9]

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[8] Section 402(b)(6) speaks in terms of persons aggrieved by a particular category of order; it does not limit the review to particular findings or conclusions underlying the order.

[9] Contrary to petitioners' assertion (Pet. 26), *Campos* v. *FCC*, 650 F.2d 890 (7th Cir. 1981), is not contrary to the decision of the court of appeals. *Campos* involved denial of applications for operator licenses, a type of order "'not precisely described by any of the categories of appeals provided for in Section 402(b),'" and for that reason was reviewable under Section 402(a). 650 F.2d at 892-893.

Petitioners also argue (Pet. 28-32) that their lateness should be overlooked because they filed in the right court and the primary purpose of Section 402 is to ensure a convenient forum. But Congress established a jurisdictional time limitation, as well as requiring filing in a particular court, and the court of appeals properly gave effect to both of these requirements.

Petitioners' additional argument (Pet. 38-44) that their petition for review was not covered by Section 402(b) because they were not parties to Mahaffey's applications and thus were not "aggrieved" by issuance of the construction permits is frivolous. Section 402(b) refers to any person "who is aggrieved * * * by *any order* of the Commission granting or denying" construction permits. 47 U.S.C. 402(b)(6) (emphasis added). The filing of petitioners' petition for review demonstrates that petitioners regard themselves as aggrieved by the Commission's order. Were petitioners not aggrieved by the order of the Commission, no petition for review would lie under either Section 402(a) or Section 402(b). See also 28 U.S.C. 2344.

In these circumstances, the court of appeals properly dismissed the petition for review for failure to meet the 30-day limit imposed by statute.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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